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## REGULATIONS

### Group girds to battle Trump over 'ghost rules'

**Arianna Skibell**, E&E News reporter

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A 2013 train accident in Canada killed dozens of people and spilled crude oil. One rule on hold was trying to prevent such an incident. Photo by the Quebec Provincial Police, courtesy of Wikipedia.

The watchdog group Public Citizen is considering bringing litigation against the Trump administration over so-called "ghost rules," or proposals that were withdrawn from the rulemaking process without explanation.

There were about 25 identified Obama administration rules nearing the end of the pipeline when White House Chief of Staff Reince Priebus issued a regulatory freeze just days after President Trump was inaugurated (*E&E Daily*, Jan. 23).

"Some of these rules had gone all the way through the agency process and were pending approval by [the Office of Information and Regulatory Affairs], and then suddenly, they're just taken down from the regulatory agenda," said Michael Kirkpatrick, an attorney at Public Citizen Litigation Group.

Other rules withdrawn from OIRA had been approved and simply needed to be sent to the Office of the Federal Register. Another group was sent to OFR but not published.

Kirkpatrick said it's not inherently problematic that these rules were withdrawn, as agencies withdraw rules all the time. The potential illegality rests on why they were removed.

"It's unclear whether they're taken down because the agency has decided to abandon that rulemaking or taken down for further study and still potentially going to be made," he said. "The lack of transparency here is part of the problem."

Rena Steinzor, a law professor at the University of Maryland and former president of Center for Progressive Reform, said agencies cannot simply withdraw rules because they've been ordered to do so. They need a substantive reason.

"You're not supposed to be able to say, 'The president got elected, and I'm doing what he told me to do,'" she said.

While some experts say agencies are not required to list a reason for withdrawing a rule, Kirkpatrick said it is possible to bring action to require an agency to explain its motive. If the

answer is "the president said to do it," then outside parties can sue claiming the reasoning is arbitrary and capricious.

Additionally, if a rule has a statutory deadline, which some of the ghost rules do, an agency can be sued if the deadline is missed.

Among the ghost rules was a economically significant U.S. EPA measure that would have ensured the absence of polychlorinated biphenyls, which can become toxic if burned, in fluorescent lights in schools and day care centers. EPA also withdrew a major rule that would have implemented a plan for oil and gas production on the Uintah and Ouray Indian Reservation in Utah.

A vanished rule from the Department of Transportation would have required railroad operations to have at least two crew members present. The rule was prompted by a 2013 Canadian train accident that killed 47 people and spilled over 1 million gallons of crude oil. The railroad industry has objected to the rule, but advocates say it could have prevented the accident.

A withdrawn Department of Energy rule requiring energy conservation standards for manufactured housing both was economically significant and has a statutory deadline.

Steinzor, along with colleagues, sent a letter to agency heads this week urging each to avoid an Administrative Procedure Act violation.

"Any notice of withdrawal must demonstrate why the problems that your agency identified when it proposed a rule are no longer harming the public interest based on facts discovered after the rulemaking was initiated and in light of the comments you have received," they wrote.

"Either silence or a statement to the effect that 'President Trump was elected and decided to abandon the rule because he is opposed to regulation in general' is likely to be overturned by the courts. But even if this were not the case, good government requires that agencies explain their actions and not act in a preemptory fashion."

Thomas McGarity, a professor at the University of Texas School of Law, and Sidney Shapiro, a professor at Wake Forest University School of Law, also signed the letter.

Curtis Copeland, former Congressional Research Service and Government Accountability Office researcher, said it's possible that agencies might have provided *Federal Register* officials with reasons for withdrawing rules, though they have not been made public.

"I called OFR a couple weeks ago to get a list of rules that were withdrawn, and they said you'd have to file a [Freedom of Information Act request]," he said.

Once an agency sends a rule to the OFR, the measure awaits publication, which can sometimes take weeks to months. When the OFR plans to publish a rule in the coming days, it prepares a list. Agencies that wish to withdraw a rule that is already on the list must send an official letter, which could provide a rationale. If the rule is not on the list, the agency can withdraw it by making a phone call.

Copeland said an OFR official told him he could file a FOIA for the listed rules, but there is no record of the ones withdrawn with a phone call.

## **'A strange, new world**

It's not unusual for a new president to freeze the regulatory agenda when taking office.

Presidents Obama, George W. Bush and Clinton signed similar orders as Trump. But in those instances, many of the rules were eventually finalized.

In a 2009 CRS report, Copeland looked at controversial rules issued near the end of the George W. Bush administration and what happened to them. He found that few were withdrawn, many were implemented, some were delayed and some were under legal challenge.

"It was very rule-specific," Copeland said in an email.

A 2002 GAO report found that some Clinton administration rules were withdrawn, but the bulk of them took effect. For many of the withdrawn rules, the agencies first published a proposed rule and invited the public to comment on the withdrawal before taking final action.

Often, an incoming administration will withdraw a rule but offer a new one in its place. The George W. Bush administration replaced a Department of Energy rule pertaining to air conditioners in January 2001. A lawsuit over that went to court, and DOE was required to implement the original rule in 2006.

Kirkpatrick said there is always some level of agency upheaval with a new administration, but the current hostility toward regulation in general is unprecedented. The combination of Trump's executive order that requires agencies to toss two rules for every new one and Congress' continued use of the Congressional Review Act to kill rules has left the impression that these ghost rules could vanish without much of a trace, Kirkpatrick and others said.

"We're in a strange, new world here," Kirkpatrick said.

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